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84-2029

No.

In The

Supreme Court of the United States

OCTOBER TERM, 1984

GERALD ANTHONY GASPARRO,
Petitioner,

V.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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Superior Court—Part A
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July 19, 1985

BEST AVAILABLE COPY

QUESTION PRESENTED

1. Did the State circumvent and expand the law of police stops set out in *Terry v. Ohio*, 392 U.S. 1 (1968).

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STATEMENT OF THE CASE

On May 19, 1982 in the Superior Court for the Judicial District of Fairfield, Connecticut, the petitioner was convicted of Larceny in the First Degree by Obtaining Property by False Pretense, in violation of Connecticut General Statutes 53a-119(2), 53a-121(b) and 53a-122(a)(2).

The conviction evolved from the theft of a diamond on October 13, 1978 from Shaeff's Jewelers, a jewelry store in Norwalk, Connecticut. His arrest and prosecution stem from the following incident in the City of Danbury, Connecticut on October 20, 1978: At the hearing of the motion to suppress Detective Russell Benjamin of the Danbury Police Department testified that, on October 20, 1978, while on routine motor patrol duty he was directed at about six forty-five p.m. to proceed to Charlop's Jewelers to investigate an attempted larceny (SH 4). Upon Benjamin's arrival he spoke to Martin Charlop who pointed to a man and told the officer that that man had given the name of Arthur Abo, and had been in the store on a previous day and made arrangements to buy a diamond for a set price (SH 5). Payment was to be by check (SH 40). Charlop further stated that he had received flyers concerning a person, fitting the man's features and using the name of Arthur Abo, having passed fraudulent checks in Norwalk and attempting to make similar transactions in other jewelry stores throughout the state (SH 5). Charlop then turned a flyer over to Benjamin who read it briefly while in the store and in further detail after his arrival at police headquarters. (State's Exhibit A SH 6, 7). This document, entitled Hot Line Memo described an October 13th diamond theft at Shaeff's Jewelers, Norwalk, as follows: Two men had perpetrated a fraud on a Norwalk Jewelry, where one, purporting to be named Arthur Abo was discovered as being about thirty-five years old, five feet eight inches tall, with stocky build and weighing about one hundred and eighty-five pounds. This person had discussed the purchase of a diamond. Two days later a second party appeared. Giving the name of Stuart Klein, he was described as also being about thirty-five years old. five feet six inches tall, with medium build, weighing about one hundred and fifty pounds and wearing

brownish-rimmed glasses. This person, the Hot Line Memo recited, purchased the diamond with an allegedly certified check in the amount of sixteen thousand dollars. Investigation revealed a fraudulent certification on a closed account.

As a result of the foregoing information with which he'd been presented, Benjamin asked the man that Charlop had pointed out to accompany him to police headquarters. The man, who identified himself as Andrew Posnack, cooperated (SH 9). While enroute (SH 12) Posnack voiced concern for his automobile, a green 1970 Ford with a New York marker plate which was parked (SH 14) around the corner from Charlop's (SH 3, 6). Because of Posnack's concern for his car and because Benjamin was aware that the flyer indicated that two persons were involved in the fraud case (SH 75), Benjamin radioed headquarters and requested that an officer be assigned to watch the car (SH 14). Once at headquarters, the Norwalk police department was contacted regarding the incident (SH 42). Benjamin further testified on direct examination that Posnack and the defendant, who was brought into headquarters later that evening, resembled the descriptions detailed in State's Exhibit A (SH 17-21).

Philip Colla testified that he was on duty as a special police officer on October 20, 1978 (SH 76), when at around 7:00 p.m. he was directed to watch and secure a green Ford with New York Plates parked on Keeler Street (SH 77-78). After Colla had beenon site for about ten minutes he observed the defendant (SH 80), being a white male five feet six to five feet eight inches in height, aged, thirty to thirty-five years, clean shaven with brown hair, walk past the car turn and come back toward it and ask the officer for the time. This person then attempted to enter the car with a key (SH 79). Colla thereupon told the defendant to stop, indicating that he'd been assigned to secure the car, and asked whose car it was. The defendant responded that the car belonged to a friend who was shopping up on Main Street and then left, walking up Keeler Street (SH 81). Colla then radioed for assistance, which arrived shortly in the person of Detective Bertalovics (SH 81-82). The two then pursued the defendant, stopping him on Main Street where Bertalovics

requested some identification. When the defendant indicated that he had none on his person, but rather it was back in the car on Keeler Street, Bertalovics directed him to get into the police vehicle (SH 82). Once at the car, the defendant entered it and produced his driver's license from a brown flat type briefcase; the petition was then taken to the police station.

Detective Roger Bertalovics testified that while on duty on the night of October 20, 1978 he was requested to go to Charlop's Jewelry where he encountered Officer Benjamin walking out of the store with Posnack (SH 244-245). At that point the two officers conferred briefly and then Bertalovics returned to headquarters where he remained for ten to fifteen minutes until receiving a request for assistance from Officer Colla (SH 246). During that interval Bertalovics familiarized himself with a couple of bulletins including the Hot Line Memo (State's Exhibit A) which detailed the Norwalk crime (SH 283-286). Bertalovics proceeded to Keeler Street where he met with Colla who advised him of the defendant's attempt to enter the car and subsequent departure from the scene (SH 247). Upon locating the defendant on Main Street, Bertalovics, noted that he fit the description set out in the Hot Line Memo. When the defendant could not produce identification he was taken back to Posnack's car (SH 247, 264) which he entered with a key (SH 248) and from which he produced his New York State driver's license (SH 249). At that point, the defendant was taken to police headquarters (SH 253).

ARGUMENT

Notwithstanding petitioner's contention that the circumstances surrounding his seizure on Main Street, Danbury, should be viewed as an unjustified extension of an investigative detention *Terry v. Ohio*, 392 U.S. 1 (1968) the Connecticut Supreme Court took a different view; that when Petitioner was stopped he was in effect placed under arrest and that arrest was based upon probable cause.

In so finding the Connecticut Supreme Court relied on: (1) the close proximity in time between the underlying offense and that in

Danbury; (2) various similarities between the two offenses including type of offense, and the common distinctive alias that was employed in both crimes and; (3) the logical connection of the petitioner to both offenses including his matching the description of one of the participants in the Norwalk crime and his possession of and attempt to use the key to the car that belonged to his acknowledged friend, Andrew Posnack, who had just been taken into custody for the attempted theft at the Danbury jewelry store.

Probable cause exists "where the facts and circumstances within their (the officers) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has occured." *Carroll v. United States*, 267 U.S. 132, 162 (1924). "In dealing with probable cause... as the very name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160. 175 (1948). The determination is to be made from the totality of the circumstances, *Illinois v. Gates*, 462 U.S. 213, 230 (1983), probable cause being "... a fluid concept - turning on the assessment of probabilities on particular factual contexts - not readily, or even usefully, reduced to a neat set of legal rules" Id at 232.

In the instant case, the Connecticut Supreme Court bypassed the investigative detention on articulable suspicion approach, *Terry v. Ohio, supra*, finding instead that petitioner was actually arrested when stopped on Main Street. That arrest, however was appropriately tested by the above cited rules respecting probable cause and was, given the totality of circumstances pertaining at the time of petitioner's arrest, correctly found to be a lawful arrest under the Fourth Amendment.

CONCLUSION

The State of Connecticut respectfully requests that the Connecticut Supreme Court correctly applied the law and prays that the petition to issue a writ of certiorari be denied.

Respectfully submitted

By: /s/ DONALD A. BROWNE

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July 19, 1985